

November 19, 2003

D.T.E. 03-TD-1

Request of Viktor Kozhenevskiy for a waiver of the appeal filing deadline pursuant to 220 C.M.R. § 250.06 to appeal the decision of the Director of the Department of Telecommunications and Energy's Transportation Division denying his application for a school bus driver certificate.

APPEARANCES: Viktor Kozhenevskiy
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I. INTRODUCTION

Viktor Kozhenevskiy applied for a school bus driver certificate with the Department of Telecommunications and Energy's Transportation Division ("Transportation Division") on February 16, 2001. On March 13, 2001 and on March 20, 2001, Mr. Kozhenevskiy failed two separate driving skills tests. On April 24, 2001, Mr. Kozhenevskiy submitted a retest application to the Transportation Division. On April 30, 2001 and on May 8, 2001, Mr. Kozhenevskiy failed two additional driving skills tests. The Transportation Division informed Mr. Kozhenevskiy, by letter dated May 16, 2001, that his application for a school bus driver certificate was denied. Subsequently, Mr. Kozhenevskiy requested an informal hearing before the Transportation Division.

On May 30, 2001, the Director of the Transportation Division ("Director") held an informal hearing pursuant to 220 C.M.R. § 250.00 et seq. By letter dated July 5, 2001, the Director upheld the Transportation Division's earlier ruling and denied Mr. Kozhenevskiy's application for a school bus driver certificate. The letter also informed Mr. Kozhenevskiy that he had 20 days from the date of the letter to appeal the Director's decision to the Department of Telecommunications and Energy ("Department")¹. The Director mailed two copies of the

¹ Transportation Division Practice Regulation, 220 C.M.R. § 250.06, Appeals from Decisions of the Transportation Division, states in part:

Any party in interest aggrieved by any order of the Director of the Transportation Division shall have a right of appeal to the Commission. Such appeal shall be claimed by filing with the Secretary of the Commission, and with the Director of the Transportation Division, a written claim of appeal within 20 days from the date of the order appealed from . . .

July 5, 2001 letter to the address provided by Mr. Kozhenevskiy to the Department: one by first-class mail, the other by certified mail. On July 27, 2001, the U.S. Postal Service returned the certified letter marked as “unclaimed” to the Department. The U.S. Postal Service did not return the first-class letter to the Department.

In a letter to the Transportation Division dated September 20, 2001, 57 days after the Director’s July 5, 2001 letter, Mr. Kozhenevskiy requested another hearing before the Department. He claimed that he tried several times to reach the Transportation Division by phone, and his messages were not returned. In a letter dated November 6, 2001, the Director instructed Mr. Kozhenevskiy that, in order to appeal the Director’s decision of July 5, 2001, he must write to the Secretary of the Department and seek a waiver of the Department’s 20-day filing deadline.² In a letter dated November 24, 2001 and received by the Department on November 30, 2001, Mr. Kozhenevskiy requested a waiver to appeal the Director’s decision rejecting his application for a school bus driver certificate. In his request for a waiver, Mr. Kozhenevskiy claimed that (1) the Department did not return several phone calls he made requesting information on the appeal; (2) he “went out of state for a while”; and (3) he responded in writing on September 20, 2001 and was “now just hearing back from your Department” (referring to the November 6, 2001 letter from the Director).

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The Director enclosed copies of the May 16, 2001 and July 5, 2001 letters from the Transportation Division with the November 6, 2001 correspondence.

II. ISSUES

A. Introduction

In considering Mr. Kozhenevskiy's request for a waiver, the Department must decide two issues: (1) did the Director execute proper service of the July 5, 2001 letter denying Mr. Kozhenevskiy's application for a school bus driver certificate; and (2) did Mr. Kozhenevskiy show good cause for filing his request for a waiver of the Department's 20-day appeal filing deadline.

B. Service of July 5, 2001 Letter

_____The Department regulation addressing service by the Department, 220 C.M.R. § 1.05(1)(c), states, "[a] copy of any paper served by the Department, showing the addresses to whom the paper was mailed, shall be placed in the Department's files and shall be *prima facie* evidence of service and the date thereof."³

_____The Department must first decide whether the Director executed proper service of the July 5, 2001 decision denying Mr. Kozhenevskiy's application for a school bus driver certificate. On July 5, 2001, the Director issued a letter informing Mr. Kozhenevskiy that his application for a school bus driver certificate had been denied and that he had 20 days to appeal the decision. The Director mailed two copies of the July 5, 2001 letter: one by first-class mail and the other by certified mail. The U.S. Postal Service returned the certified letter marked "unclaimed," while the letter sent by first-class was not returned to the Department.

³ In accordance with 220 C.M.R. § 1.01(2), 220 C.M.R. § 1.05(1)(c) governs the Transportation Division (formerly Commercial Motor Vehicle Division) practice and procedure.

See G.L. c. 25, § 5 (service of Commission decisions by mailing, postpaid, “shall be presumed to have occurred in the normal course of delivery of such mail”). See also Mass. R. Civ. P. 5(b) (service of mail is complete upon mailing).⁴ Additionally, the Director, in accordance with Transportation Division practice and procedure, placed a copy of the July 5, 2001 letter containing Mr. Kozhenevskiy’s address in the Transportation Division files establishing prima facie evidence of service. 220 C.M.R. § 1.05(1)(c). Consequently, the Department finds that service of the Director’s July 5, 2001 letter was proper.

C. Waiver of Deadline for Appeal

_____ 1. Standard of Review

A request for a waiver of an appeal deadline pursuant to 220 C.M.R. § 250.06 is analogous to a motion to extend the judicial appeal period of a Commission order filed with the Department pursuant to G.L. c. 25, § 5 and 220 C.M.R. § 1.11(11).⁵ Both a request for a

⁴ Although the Department has not adopted the Massachusetts Rules of Civil Procedure, the Department often uses these rules for guidance. See 220 C.M.R. §§ 1.06(6)(c)(2); 1.06(6)(c)(4); MCI WorldCom, Inc., D.T.E. 97-116-E at 13 n. 9 (2000); NYNEX, D.P.U. 94-50, at 33 n. 24 (1995).

⁵ G.L. c. 25, § 5 states in part:

[A] petition for appeal shall be filed with the secretary of the commission within twenty days after the date of service of the decision . . . or within such further time as the commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision”

220 C.M.R. § 1.11(11) states:

In accordance with M.G.L. c. 25, § 5, judicial appeals from final Department Orders must be filed within 20 days after service of the Order. Upon motion to

(continued...)

waiver of an appeal deadline and a motion to extend the judicial appeal period invoke Department consideration as to whether an exception to the rules regarding the timeliness of appeals is warranted.

In addressing a motion to extend the judicial appeal period of a Commission order, the Department has stated that the 20-day appeal deadline indicates a clear intention on the part of the legislature and the Department to ensure that the decision of an aggrieved party to appeal a final order of the Department be made expeditiously. Nandy v. Massachusetts Electric Company, D.P.U. 94-AD-4A at 4 (1994). Swift judicial review benefits both the appealing party and other parties, and serves the public interest by promoting the finality of Department orders. Id.; Nunnally d/b/a L&R Enterprises, D.P.U. 92-34-A at 4 (1993).

The Department's procedural rules state that reasonable extensions of the appeal period shall be granted upon showing of good cause. 220 C.M.R. § 1.11(11). With regard to determining what constitutes good cause, the Department has stated:

Good cause is a relative term and it depends on the circumstances of an individual case. Good cause is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other affected party.

Nandy, at 4, citing Boston Edison Company, D.P.U. 90-355-A, at 4 (1992).

⁵(...continued)

the Department within the 20-day period, a party may request an extension of the appeal period. Reasonable extensions shall be granted upon a showing of good cause.

2. Analysis and Findings

The Department must decide if Mr. Kozhenevskiy showed good cause for filing his request for a waiver after the expiration of the 20-day deadline for appeal requests mandated by 220 C.M.R. § 250.06. In his request for a waiver of the Director's July 5, 2001 decision, by letter dated November 24, 2001 and filed November 30, 2001, Mr. Kozhenevskiy argues that the Department should grant his request for the following reasons: (1) he called the Department several times to request information on an appeal and his calls were not returned; (2) he "went out-of-state for a while"; and (3) he responded in writing on September 20, 2001, and was "now just hearing back from your Department" (referring to the November 6, 2001 letter from the Director).

An appeal of the Director's July 5, 2001 decision was due on July 25, 2001, 20 days after the date of the decision, pursuant to 220 C.M.R. § 250.06. This information was clearly conveyed in writing to Mr. Kozhenevskiy from the Director in his decision by letter dated July 5, 2001. Mr. Kozhenevskiy's letter requesting an informal hearing is dated September 20, 2001. In his September 20, 2001 letter, Mr. Kozhenevskiy states that he attempted to contact the Transportation Division by telephone to "request an informal hearing," his messages were not returned, and he later went out-of-town. He provides neither specific dates for the alleged telephone calls nor specific dates or explanation for his out-of-town absence. Additionally, Mr. Kozhenevskiy fails to provide a sufficient explanation for delaying his first written response until September 20, 2001, 57 days after the appeal

due-date. Simply stating that he was “out-of-town” for an unspecified period of time does not justify his late response to the July 5, 2001 decision, properly served upon him. Therefore, the Department finds that Mr. Kozhenevskiy has not shown good cause for granting his request for a waiver of the appeal deadline pursuant to 220 C.M.R. § 250.06.

IV. ORDER

Accordingly, after due consideration it is

ORDERED: That Viktor Kozhenevskiy's request for a waiver of the appeal filing deadline pursuant to 220 C.M.R. § 250.06 to appeal the July 5, 2001 decision of the Director of the Department of Telecommunications and Energy's Transportation Division denying his application for a school bus driver certificate is hereby DENIED.

By Order of the Department,

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).